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ATTACHMENT IN TORT ACTIONS IN INDIANA

The view is general among the lawyers of Indiana that an attachment can be had only in actions based on express or implied contract and not in cases based on tort. Whether such view is correct depends, of course, upon the proper construction of the attachment statute, as the remedy of attachment is purely statutory.

So much of the Indiana statute as sheds any light on this question is as follows (references are to Burns' Annotated Indiana Statutes, 1926 Revision, with the important words in *italics*) :

981. The plaintiff, at the time of filing his complaint, or at any time afterward, may have an attachment against the property of the defendant, in the cases and in the manner hereinafter stated, *where the action is for the recovery of money*:

First. Where the defendant, or one of several defendants, is a foreign corporation or a non-resident of this state.

Second. Where the defendant, or one of several defendants, is secretly leaving or has left the state, with intent to defraud his *creditors*.

Third. So conceals himself that a summons can not be served upon him.

Fourth. Is removing or about to remove his property subject to execution, or a material part thereof, out of this state, not leaving enough herein to satisfy the *plaintiff's claim*.

Fifth. Has sold, conveyed or otherwise disposed of his property subject to execution, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder or delay his *creditors*.

Sixth. Is about to sell, convey or otherwise dispose of his property subject to execution, with such intent.

982. No attachment, except for the causes mentioned in the fourth, fifth and sixth clauses of the preceding section, shall issue against any *debtor* while his wife and family remain settled within the county where he usually resided prior to his absence, if he shall not continue absent from the state more than one year after he shall have absented himself, unless an attempt be made to conceal his absence.

983. If the wife or family of the *debtor* shall refuse or be unable to give an account of his absence, or the place where he may be found, or shall give a false account of either, such refusal, inability or false account shall be deemed an attempt to conceal his absence within the provisions of this act.

987. The plaintiff, or some person in his behalf, shall make an affidavit showing:

First. The nature of the *plaintiff's claim*.

Second. That it is just.

Third. The amount which he *believes the plaintiff ought to recover*.

Fourth. That there exists, in the action, some one of the grounds for an attachment above enumerated.

This statute has been in force since 1852. Prior to that date the attachment statute similarly provided that a debtor's prop-

erty could be attached, but in addition required that the affidavit should set out the nature of the *contract* by reason of which the plaintiff had a right to recover his debt or damage. It is therefore clear that prior to the Code of 1852 attachment did not lie in tort actions.

This question of the construction of the present attachment statute apparently has never been passed upon by either of the appellate courts of the state. However, the case of *Shedd et al. v. Calumet Construction Company*,¹ decided by the United States Circuit Court of Appeals for the Seventh Circuit, on appeal from the District Court for Indiana, squarely holds that an attachment in a tort action is authorized by the Indiana statute. This decision is not binding on our courts, but should be given considerable weight as a precedent, especially in view of the fact that Judge Baker, one of the judges, had formerly been a member of our Supreme Court. In that case the court says, after citing the statute (Sec. 981):

"A tort action in attachment was brought in the Indiana state court by defendant in error company against the Shedd's, plaintiffs in error, and removed to the federal court. The service was by publication. One of the alleged errors is in the overruling of the Shedd's motion to quash the attachment and service, upon the ground that the statutes of Indiana do not authorize attachment in actions in tort. The statute authorizes attachment upon the grounds therein stated, "where the action is for the recovery of money." Section 947, Burns' R. S. Ind. 1914. Notwithstanding the statute has been long in force, we are unable to find that this question of its construction has been passed upon by any Indiana court of review, and counsel on both sides say it has not. The right of attachment exists by statute, and concededly, where the statute does not clearly authorize attachment in actions *ex delicto*, the right does not exist. In some of the states, where, as in Indiana, the right of attachment is given in actions "for recovery of money," it has been held applicable to actions in tort as well as in contract. *Davidson v. Owens*, 5 Minn. 50 (Gil. 50); *Thompson v. Stringfellow*, 119 Ala. 317, 24 South. 849; *Cain v. Perfect*, 89 Kan. 361, 131 Pac. 573; *Collins v. Stanley*, 15 Wyo. 282, 88 Pac. 620, 123 Am. St. Rep. 1022; *Kidd v. Seifert*, 11 Okl. 32, 65 Pac. 931; *Lagerwahl v. White*, 154 Ky. 162, 156 S. W. 1079; *Carolina Agency Co. v. Garlington*, 85 S. C. 114, 67 S. E. 225; *Sturdevant v. Tuttle*, 22 Ohio St. 111.

The statutory expression, "for the recovery of money," is surely broad enough to include such actions, which manifestly have for their sole purpose the recovery of money. In the absence of any limitation by construction of the Indiana courts, we do not, under the circumstances, feel warranted in circumscribing it as contended for, and we therefore hold that the alleged error predicated on the denial of the motion to quash the attachment is not well grounded."

A careful analysis of the statute shows the correctness of the Federal decision. The use of the words *creditors*, *debtors* and

claims shows an intent to include tort actions. The term *creditors* as used in the statute relating to fraudulent conveyances includes persons having claims arising from torts.² The word *debtor* has been held to include a tortfeasor.³ The term *claim* is not limited to contract rights but embraces causes of action sounding in tort as well.⁴

It is worthy of note that at least one case of attachment in a tort action has been appealed and affirmed in this state without the present question being raised.⁵ As such a case is usually found only by accident, there are probably others similarly hidden in our reports. It indicates that the legal profession did not question the right to an attachment in a tort action for many years after the attachment statute was in force.

The foregoing considerations would seem to leave little doubt that in Indiana an attachment will lie in tort actions. The distinctions between attachment and garnishment should be kept in mind, however, as the garnishment statute (Sec. 1002) expressly limits that remedy to actions based on contract.

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² *Pennington v. Clifton* (1858), 11 Ind. 162; *Rhodes v. Green* (1871), 36 Ind. 7, *Shean v. Shay* (1873), 42 Ind. 375; *Bishop et al. v. Redmond* (1882), 83 Ind. 157.

³ *Westmoreland v. Powell* (1877), 59 Ga. 256.

⁴ *Barrett v. Mobile* (1901), 129 Ala. 179, 30 So. 36.

⁵ *Gephart v. Burkett* (1877), 57 Ind. 378.